

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
)  
Amendment of Section 73.202(b), ) MM Docket No. 96-240  
Table of Allotments, ) RM-8946  
FM Broadcast Stations ) RM-9019  
(Lockport and Amherst, New York) )

MEMORANDUM OPINION AND ORDER

Adopted: September 1, 1999

Released: September 17, 1999

By the Chief, Allocations Branch:

1. The Commission has before it a Petition for Reconsideration filed by Culver Communications Corp. ("Culver Communications") directed to the Report and Order in this proceeding. 13 FCC Rcd 12304 (1997). Kevin O'Kane ("O'Kane") has filed an Opposition to the Petition for Reconsideration. For the reasons discussed below, we deny the Petition for Reconsideration.

2. Background. At the request of Culver Communications, the Notice of Proposed Rule Making ("Notice") in this proceeding proposed the allotment of Channel 221A to Lockport, New York, as a first local FM service. 11 FCC Rcd 20514 (1996). In response to the Notice, O'Kane counterproposed the allotment of Channel 221A to Amherst, New York, as that community's first local FM service. Inasmuch as there was no alternate channel for either community, it was necessary to comparatively consider these proposals under the priorities set forth in Revision of FM Assignment Policies and Procedures.<sup>1</sup> Lockport has a 1990 U.S. Census population of 24,426 persons and receives local service from full-time AM Station WLVL. Amherst has a 1990 U.S. Census population of 111,711 persons and receives local service from daytime-only AM Station WUFO. Since neither proposed allotment would provide either a first or second fulltime aural reception service and both communities have local aural transmission service, the first three priorities were inapplicable in this case. In this light, the rival proposals were compared under the fourth priority, namely, "other public interest matters." The Report and Order allotted Channel 221A to Amherst because this allotment would provide service to a community that has four times the population of Lockport and would also provide Amherst with its first nighttime aural service.

3. Petition for Reconsideration. In its Petition for Reconsideration, Culver Communications repeats its argument that Amherst is a part of the Buffalo, New York,

<sup>1</sup> 90 FCC 2d 88 (1982). These priorities are: (1) first full-time aural reception service; (2) second full-time aural reception service; (3) first local transmission service; and (4) other public interest matters [co-equal weight is given to priorities (2) and (3)].

Urbanized Area, and that, absent a contrary showing concerning Amherst, the Commission should presume that O'Kane's proposed community of license would "not be Amherst alone, but rather would be the entire Buffalo Urbanized Area."<sup>2</sup> Culver Communications recognizes that the Commission has applied the Huntington policy to a narrow class of cases involving proposals to change the community of license of an existing station where the proponent of the change seeks a first local service preference.<sup>3</sup> Nevertheless, Culver Communications claims that no basis exists for such an unduly narrow reading of Section 307(b) of the Communications Act. Culver Communications observes that the service to Amherst that would be delivered by the O'Kane proposal would be completely overlapped by no fewer than 15 other signals, whereas Culver Communications's proposed service would be partially overlapped by only four other signals and Culver Communications would provide a fifth new service to 2,679 persons. Further, Culver Communications contends that the fact the Amherst proposal would serve a larger audience should not matter because Amherst is located within the Buffalo Urbanized Area and the larger audience is already well-served by the many stations already licensed to that area.

4. In its Opposition to Culver Communications' Petition for Reconsideration, O'Kane argues that the Report and Order was well-reasoned and in accord with existing precedent. O'Kane contends that Culver Communications' argument that the Commission should presume that O'Kane's proposed community of license would be the entire Buffalo Urbanized Area, is not supported by the cases Culver Communications cites. O'Kane claims that Culver Communications has not presented any persuasive argument for changing Commission precedent and did not request the Commission to elicit evidence from the parties concerning any presumption that Amherst is not independent from the Buffalo Urbanized Area.<sup>4</sup> O'Kane argues that even if the Commission were to consider such evidence, the result would be the same because an analysis of Amherst demonstrates that it is independent of Buffalo. In this regard, O'Kane argues that he made such an analysis in his May 12, 1997 Petition for Leave to File Response and Response. However, the Report and Order ruled that this pleading would not be considered because it was an unauthorized pleading. O'Kane contends that if the Commission believes Culver Communications' allegation that Buffalo should be considered as O'Kane's proposed community of license, O'Kane should be given an opportunity to demonstrate that Amherst is independent from Buffalo. Therefore, to the extent that the Commission might consider the possibility that the Buffalo stations should be attributed to Amherst, O'Kane incorporates by reference his May 12, 1997 pleading into his Opposition pleading for the purpose of demonstrating that Amherst is independent from Buffalo.

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<sup>2</sup> Culver cites the following cases as supporting its proposition: Huntington Broadcasting Co. v. FCC (Huntington), 192 F.2d 33 (D.C. Cir. 1951); Beaufort County Broadcasting Co. v. FCC, 787 F.2d 645 (D.C. Cir. 1986); Modification of FM and TV Authorizations, 5 FCC Rcd 7094, n.14 (1990); and Clovis and Madera, California (Clovis), 11 FCC Rcd 5219, 5223, para. 17 (Allocations Br. 1996).

<sup>3</sup> Culver cites Remington and Falmouth, Virginia, 8 FCC 6627, n.5 (Allocations Br. 1993) as an example of this approach.

<sup>4</sup> O'Kane quotes a description of the kind of evidence considered in these situations from Headland, Alabama and Chattahoochee, Florida, 10 FCC Rcd 10352, 10355 (Allocations Br. 1995)

5. Discussion. In the rulemaking case before us, neither community can receive credit for providing a first local transmission service, which is priority (3) under the allotment priorities set forth in Revision of FM Assignment Policies and Procedures, because both communities already have local AM transmission service. Thus, our decision must be based upon "other public interest matters," which is listed as priority (4). It continues to be our view that a local service to Amherst with a population of 111,711 persons would provide a greater public interest benefit than a local service to Lockport with a population of 24,426. See, e.g., LaGrange and Rollingwood, Texas, 10 FCC Rcd 3337 (1995). We also observe that, if operated with maximum facilities, a Channel 221A allotment at Amherst would provide primary service (60 dBu) to 1,042,802 people covering 1,996 square kilometers (771 sq. mi.). The proposed service area at Amherst is already covered by at least five existing full-time services, which is considered to be adequate coverage. A Channel 221A allotment at Lockport would provide primary service (60 dBu) to 549,152 people covering 2,160 square kilometers (834 sq. mi.). The proposed service area at Lockport is already covered by at least three full-time services. We recognize that within this proposed service area, there is an area consisting of 988 people and 32.6 square kilometers (12.6 sq. mi.) that presently receives only four full-time radio signals, while another area containing 862 people and 43.2 square kilometers (16.7 sq. mi.) presently receives only three full-time services. These population gains of a fifth and fourth service do not negate the significant overall population gain of the Amherst proposal. The remainder of the proposed Lockport service area receives five radio signals. In addition, we note that the Channel 221A allotment to Amherst will provide a second local service and a first local nighttime service, while a Channel 221A allotment to Lockport will only provide a second local service. Considering all of the foregoing aspects of both proposals, we continue to believe that the public interest benefits of the Amherst proposal outweigh the benefits of the Lockport proposal.

6. The gravamen of Huntington and the other cases cited by Culver Communications is whether a proposal for a suburban community in an Urbanized Area is entitled to a comparative preference as a first local service. In this proceeding, we are not considering the Amherst proposal as a first local service. Notwithstanding the inapplicability of Huntington to this proceeding, we will address the underlying concerns of Huntington and Culver Communications' Petition for Reconsideration. In order to do so, we shall examine the proposed allotment as being for a suburban community pursuant to the criteria set forth in RKO General, Inc. (KFRC), 5 FCC Rcd 3222 (1990) and Faye and Richard Tuck, 3 FCC Rcd 5374 (1988). First, we examine the "signal population coverage," which is defined as the degree to which the proposed station could provide service not only to the suburban community but also to the adjacent metropolis. Second, we examine the size of the suburban community relative to the central city and whether the suburban community is within the Urbanized Area of the central city. Third, we examine the interdependence of the suburban community with the central city.

7. If we were to examine the Amherst proposal under these criteria, we would conclude that Amherst is entitled to consideration as a local service and, at the very least, entitled to consideration for a new local service regardless of its proximity to the Buffalo Urbanized Area. In regard to the criteria outlined above, we wish to make several observations regarding the allotment of Channel 221A to Amherst, New York. A Class A FM

facility is the minimum FM allotment. The Buffalo Urbanized area encompasses 306.7 square miles. In view of the limited size of that Urbanized Area, a Class A FM allotment to any community in that Urbanized Area would invariably provide city-grade coverage to a significant portion of the Urbanized Area. In this situation, such coverage would not have supported a conclusion that Kevin O'Kane is merely proposing an allotment to Amherst in order to serve the Buffalo Urbanized Area. There is also nothing in the record of this proceeding that would have suggested that Buffalo, with a population of 328,123 persons, is sufficiently large or dominant enough to preclude a finding that Amherst, with a population of 111,711 persons, is an independent community entitled to a new broadcast service. Finally, utilizing all of the record evidence, including O'Kane's Response to Culver Communications' Reply Comments, we would have observed that Amherst is an independent community with its own elected Supervisor and Town Board, its own police and fire departments, both private and public schools, and a private college. In addition, Amherst has a hospital, places of worship and civic organizations, and approximately 5,000 businesses that provide employment to approximately 17,861 of its residents. Thus, any examination of Amherst under a Huntington analysis as suggested by Culver Communications, would have concluded that Amherst is independent of the Buffalo Urbanized Area and entitled to its own broadcast service.

8. Accordingly, IT IS ORDERED That the Petition for Reconsideration filed by Culver Communications Corp. IS DENIED.

9. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau